IN THE

Supreme Court of the United States

Nos. 224 and 225.
October Term, 1953

No. 224.

CIVIL AERONAUTICS BOARD,

Petitioner,

vs.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, THE UNITED STATES OF AMERICA, on Behalf of the Postmaster General, and WESTERN AIR LINES, INC.

No. 225.

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD, ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and the UNITED STATES OF AMERICA, on Behalf of the Postmaster General.

PETITION OF WESTERN AIR LINES, INC., FOR REHEARING.

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SUBJECT INDEX

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PETITION OF WESTERN AIR LINES, INC., FOR REHEARING.

Western Air Lines, Inc., respectfully petitions this Court to grant a rehearing of its judgment and decision in these cases delivered on February 1, 1954.

Preface.

This controversy arose out of conflicting interpretations placed upon Section 406 of the Civil Aeronautics Act by the two Federal agencies affected and by Western. This Court has construed the statute in a manner opposed to the views of the Federal agency having the duty of administering the statute.

Important questions in the construction of the statute are involved, and a real need exists for the Court to lay down clear guides for the benefit of the Federal agencies affected and the air transportation industry as a whole. The decision is wanting in definiteness.

The purpose of this petition is to point out the deficiencies in the opinion and the reasons why the decision should be recast.

Reasons for Granting a Hearing.

1. The Opinion Hinges on "Subsidy" Without Statutory Justification.

The idea that a so-called "subsidy" rate of compensation for transporting the mail, as contrasted with what has been styled a "service" rate, is at issue permeates and influences the opinion, although the words "subsidy" and "service" are not in the statute. To the extent that there be an unexpressed difference between rates under the statute, identical words used by the Congress to describe both types of rates should not be given differing contexts depending upon the type of rate in question.

The point is staged by the statement in the opinion that "Some air mail rates are service rates, based on mail-miles flown; others are subsidy rates based on 'need'" (Printed opinion, p. 4). There is no statutory basis for the distinction. Contrary to the Court's statement, "service" as well as "subsidy" rates under the statute are based on "need"—the so-called "service" rate, on "the *need* of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service," and the so-called "subsidy" rate, on "the *need* of each such air carrier for compensation for the trans-

portation of mail sufficient . . . to enable" the air carrier to maintain and continue the development of air transportation. The same word "need" was used by the Congress to introduce two separate factors to guide the Board in fixing fair and reasonable rates under the statute. The same word may not be given dual and different meanings, as suggested by the decision.

2. "Need" Is Not the Sole Criterion for Mail Compensation.

The Court's postulate that the "standard prescribed by Congress . . . is 'the need' of the air carrier whose subsidy rates are being fixed" and that "Western's 'need' is the measure of the amount authorized by Congress" (Printed opinion, p. 6) fails for lack of demonstration. The express language of Section 406(b) makes the "need" of the air carrier one only of the standards prescribed by the Congress for the Civil Aeronautics Board to "take into consideration, among other factors," in determining rates of compensation for carrying the mail. The statute does not bind the Board as to the part its consideration of the rate-making factors should play in its final determination or as to what weight each factor should be given. The decision ignores the statute and binds the Board to look only to the "need" of the air carrier.

3. "Need" Is Not a Limiting Factor.

The Court makes an implied finding that the rate of compensation under the statute may not exceed the particular carrier's "need." There is nothing in the statute justifying the conclusion that the "need" of an air carrier establishes a maximum above which the Board may not go. All the Board is required or able to do

under the statute is to "fix fair and reasonable rates of compensation for the transportation of mail by aircraft." (Section 406(a).) This the Board did.

4. The Board Acted Within Its Discretion.

The opinion contains an erroneous finding that "the Board . . . forsook the standard of 'need' and adopted a different one" (Printed opinion, p. 5). The record is clear. The Board determined and *considered* the compensation "needed" by Western and then, within its discretion, adjusted that compensation by the amount required to encourage voluntary route transfers which would improve the air route pattern of the nation. The Board met its obligations under Sections 2 and 406 of the Act, in the only way possible to effectuate the desires of the Congress.

5. "Need" for Compensation Is Not a Requirement.

The opinion intimates that if the Board had found that there was "need" for the payment of an "additional subsidy" to Western, this might have satisfied the Court's interpretation of the statutory requirement (Printed opinion, p. 6). But the statute does not require the Board to find a "need" for compensation for transporting the mail. As a *guide* the Congress directed the Board to consider, among other things, the "need" of the air carrier for compensation. The Congress did not intend to place the Board under a requisition to act solely on the strength of such "need," in disregard of other pertinent considerations. The mandate of the statute is that the Board shall fix and determine "fair and reasonable rates of compensation for the transportation of mail by aircraft," not that the Board shall fix such rates but only

to the extent of a "need" for compensation. If there be no actual economic "need" for compensation for carrying the mail, because the carrier's treasury is "lush," the Board is not excused from fixing a rate. If so, the statute would be unconstitutional.

6. The Opinion Feigns a Definition of "Revenue."

The imperfect syllogism underpinning the Court's construction of the statutory words "all other revenue" is that because compensation for the transportation of mail is flight income, "all other revenue" must include non-flight income from incidental air carrier activities (Printed opinion, p. 4). The conclusion is a *non-sequitur,* because it is equally reasonable to interpret "other revenue" as limited to the categories of flight and operating income, other than mail revenue, normally generated by air carriers. Gain from the sale of a route and profits from the operation of a slot machine concession are not operating or flight income but rather are sporadic and fortuitous collateral income not susceptible of forecast by the Board.

7. The Opinion Substitutes "Income" for "Revenue."

It is assumed that "all other revenue" includes non-flight income from incidental air carrier activities, but the Court made no attempt to prick out a line between incidental air carrier activities and those air carrier activities, if any, which are not incidental. "Incidental" affords no guide because the word is incapable of abstract meaning.

The announced rule of these cases is that net profits from the operation of a slot machine concession and a gain from the sale of a route stem from incidental air carrier activities and therefore constitute "revenue." If these

items of income be "revenue," it necessarily follows that all income of an air carrier, whatsoever the source, is "revenue" within the meaning of Section 406(b). The only possible justification for the decision is that anything an air carrier does is an incidental air carrier activity, because the actor is an air carrier. Hence, "revenue" really means "income."

The Court has failed to heed a careful choice of words by the Congress, for if the Congress had intended "revenue" to mean "income," it would have said "all other income." Deficiencies in the statute, if such there be, may not be remedied by this Court but must be left for action by the Congress.

8. No Definitive Meaning of "Revenue" Is Reached.

The decision meets none of the contentions advanced by Western with respect to the meaning of the statutory words "all other revenue of the air carrier." That category, however inclusive, may not be broader than the intended meaning of the word "revenue," and if the Congress meant "income" it would have used "income." The Court has not attempted to define "revenue" nor has it ruled that "revenue" means "income." The meaning of the language was left *in vacuo*.

The manifest intent of the Congress in Section 406 of the Civil Aeronautics Act was to establish a scheme for fixing prospective rates of compensation for transporting the mail by aircraft. The Court gave no weight to such intent in construing the statute, although it is apparent that income of the nature of the items here in question could not have been in the minds of the Congress when it chose to use the word "revenue."

Finally, the Court has not met the contention that capital gains may not be used to reduce compensation for transporting the mail because capital losses are not recoverable through such compensation. To paraphrase conversely a statement of the Court, if the carrier's treasury be depleted, "the need" of the carrier increases whether the poverty be due to transportation activities or to activities incidental thereto. But neither the Court nor the Board has suggested that losses from incidental air carrier activities—including, as the Court would have it, the sale of capital assets—may be replenished through mail pay. The fair rule is that the stockholders, who, under our system of non-government owned carriers, must furnish and replace capital assets, shall have the benefit of capital gains. The decision, shattering every concept of justness, confiscates capital gains to the use of the general public at the expense of the stockholders, who must bear the burden of capital losses.

Conclusion.

The uncertainties retained and created by the decision will harass the air transportation industry and provoke further litigation. These are the pleadings for reconsideration.

Though it be the will of the Court to adhere to its first conclusion, the points still puzzling the responsible Federal agencies and the American flag air carriers should be placed in focus. If "all other revenue" in fact means "all other income, regardless of source" because the inclusive nature of the category precludes a narrow reading, the Federal agencies and the industry should be so advised with preciseness and not be compelled to guess.

If it means less than that, clear specifications should be written for the term "income from incidental air carrier activities." And those concerned should be told whether losses from incidental air carrier activities are to be recouped or only the profits siphoned over.

Los Angeles, California, February 12, 1954.

Respectfully submitted,

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Certificate of Counsel.

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Los Angeles, California, February 12, 1954.

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